Filed 8/16/19 P. v. Esparza CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN ALFRED ESPARZA, Defendant and Appellant.	G055341 (Super. Ct. No. 12NF2602) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Reversed.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Adrian Alfred Esparza of multiple gang-related offenses. During deliberations, the jury announced it was deadlocked 10 to 2 in favor of conviction. The trial judge questioned the jurors to find out whether everyone on the jury participated in deliberations. During this inquiry, the court and the prosecutor delved into the content of the deliberations. Two jurors also disclosed that during deliberations, one of the holdout jurors had informed the other jurors she had grown up in a gang neighborhood and her uncle was a former gang member. Because the holdout juror never disclosed this information during jury selection, the trial court believed this omission constituted misconduct and removed her from the jury. The jury then convicted Esparza as charged.

Esparza contends the trial court violated his right to a fair and impartial jury because the court's questions during its investigation invaded the sanctity of the deliberative process and resulted in the improper discharge of the holdout juror. For the reasons set forth below, we conclude the trial court impermissibly intruded into jury deliberations and the record does not show to a "demonstrable reality" that the discharged juror intentionally withheld material information. Accordingly, we reverse the judgment because Esparza suffered prejudice from the court's actions.

I

FACTUAL AND PROCEDURAL BACKGROUND

In September 2011, Alejandro T. was walking home when he encountered Ismael Moreno, an Atwood street gang member, and his fellow gang members. The men wanted to talk with Alejandro, but when he refused, Moreno smashed a beer bottle over his head. The next day, Alejandro reported the incident to the police, and Moreno was charged with assault.

Moreno and Esparza, also an Atwood gang member, attempted to intimidate Alejandro and force him to recant his allegations against Moreno. They separately and repeatedly warned him he would regret it if he did not drop the charges

against Moreno. During one encounter, a gang member scrawled Atwood gang graffiti on the kitchen wall and floor of Alejandro's residence. After a suspicious fire at Alejandro's trailer home, Alejandro called the police and reported Esparza's and Moreno's threats.

The prosecution jointly charged Esparza and Moreno with conspiring to dissuade Alejandro from testifying by force or threat, actually dissuading him in that manner, burglary and street terrorism. It was also alleged they acted for the benefit of a criminal street gang. On the second day of deliberations, the jury informed the trial court it was deadlocked. After questioning several jurors about how the deliberations were proceeding, the judge ended up removing Juror No. 3 for not disclosing her experience with gang members during voir dire. The jury then found defendants guilty as charged. The judge sentenced them to seven years to life in prison for their crimes.

II

DISCUSSION

Esparza contends (1) the trial court impermissibly intruded into the jury deliberations because it lacked any basis to initially question the jurors about potential juror misconduct (failure to deliberate); (2) the court's further inquiry into the issue unduly invaded the deliberative process; and (3) insufficient evidence supported the court's finding that a holdout juror committed misconduct. We agree with all three contentions.

A. *Initial Inquiry into Jurors' Purported Failure to Deliberate*

1. Relevant Facts

On the second day of deliberations, the jury informed the court, "We have at least two jurors who cannot agree with the other ten. We believe we cannot come to a unanimous verdict on [the conspiracy, dissuading, and burglary counts]."

The court called the jury into the courtroom to discuss the impasse. It asked the foreperson, Juror No. 1, if there was anything the court could do to assist the

jury in reaching a verdict. The juror answered, "No. We've discussed it now for many hours, each count, and there are two persons on the jury that have expressed that they absolutely will not change their minds."

Without prompting by the court, Juror No. 5 told the court the split was 9 to 2 in favor of conviction, with one juror undecided. The court did not interrupt the juror as she explained they were having difficulty getting past the conspiracy count, which they spent most of their time discussing. Because "[w]e haven't spent as much time on the other counts as we had on [count] 1," the juror did not believe they had "fully fleshed out the other counts." The juror also stated that "not [] all of the jurors" engaged in "full deliberation" on the remaining counts.

All jurors agreed they could not reach a unanimous verdict, even if they took the conspiracy count out of the equation. As the foreperson explained, "there is a large part of the court testimony [the two holdout jurors] do not believe . . . and their mind[s] cannot be changed[.]"

Following this initial round of questioning, the prosecutor requested a sidebar. The prosecutor said she was concerned whether the jury had fully and properly deliberated on all of the counts. While recognizing the holdout jurors were entitled to rest their decision on the credibility of a prosecution witness, the prosecutor feared they might have made up their mind without considering all of the evidence on each count. The court said it was "pretty clear" the jury had in fact deliberated on all of the counts, but "[j]ust because I'm clear on it doesn't mean the world is clear on it." The court decided to question the jurors on that issue.

2. Analysis

It is well established that "'the secrecy of deliberations is essential to the proper functioning of juries.'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 481-482 (*Cleveland*), quoting *U.S. v. Thomas* (2d Cir. 1997) 116 F.3d 606, 618-619.) "The need to protect the sanctity of jury deliberations, however, does not preclude reasonable

inquiry by the court into allegations of misconduct during deliberations." (*Cleveland, supra*, 25 Cal.4th at p. 476.) Juror misconduct can take many forms, including failing to deliberate. (*People v. Engelman* (2002) 28 Cal.4th 436, 442 (*Engelman*) [court may remove a juror who fails or refuses to deliberate].) But there must be an allegation or suggestion of misconduct before a trial court may investigate the misconduct. (See *id.* at p. 446 [courts should not "needlessly . . . induce jurors to expose the contents of their deliberations."]; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 & 1054 (*Barnwell*) [once a trial court is on notice of possible juror misconduct, it has a duty to investigate the misconduct].) As the Supreme Court has explained, "a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." (*Cleveland, supra*, 25 Cal.4th at p. 478.)

People v. Nelson (2016) 1 Cal.5th 513 (*Nelson*) governs when a trial court may inquire into juror misconduct and is dispositive in this case. The facts of *Nelson* are similar to the facts here. In *Nelson*, during the penalty phase trial, the jury informed the court it was deadlocked, with the final vote 10-2. (*Id.* at p. 561.) In response to the impasse, the court subjected "the jurors to a detailed questionnaire that asked them to report on the thoughts and conduct of their fellow jurors—specifically, *whether the jurors were refusing to deliberate*, whether they were basing their position on anything other than the evidence and jury instructions, and whether they were expressing views about the inappropriateness of the death penalty or life without parole based on anything other than evidence and law." (*Id.*, at p. 569, italics added.) The California Supreme Court found it was improper to do so "[b]ased solely on the reported impasse." (*Ibid.*) Here, in response to an impasse, the trial court questioned each juror whether he or she believed all 12 jurors deliberated on all counts. This was error under *Nelson*.

Below, the prosecutor urged the trial court to investigate whether all jurors deliberated because she inferred from the statements of some jurors that other jurors had

made up their mind before deliberations. (See *People v. Homick* (2012) 55 Cal.4th 816, 898 [grounds for investigation into alleged juror misconduct may be established by events that arise during deliberations and are reported by fellow panelists].) The court agreed and launched an inquiry based on the prosecutor's allegation. The record, however, does not support the court's decision.

Juror No. 1 stated that "[w]e've discussed it now for many hours, each count." Juror No. 5 stated the jurors spent the majority of their time discussing the conspiracy count and some jurors had not "full[y]" deliberated on the other counts. But "full deliberation" is not required. A juror may have deliberated in a brief but reasonable amount of time, and then concluded that no further deliberations were necessary. That is not misconduct. (See *Cleveland*, *supra*, 25 Cal.4th at p. 485 ["A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views."].) As the trial court itself stated, it was "pretty clear" all jurors had deliberated. The court therefore erred in deciding to question the jurors on whether any of them failed to deliberate.

B. *Scope of Inquiry into Juror Misconduct*

1. Relevant Facts

a. Inquiry of Entire Jury

After deciding to investigate possible juror misconduct, the court convened the entire jury and asked each of the jurors "are you of the opinion that all 12 jurors actually deliberated on all counts?" Juror Nos. 1 through 6 said they felt everyone on the jury had engaged in deliberations on all of the counts. Juror No. 7 disagreed. She stated, "I think there is one juror that has not given the law and the evidence enough deliberation. [¶] . . . [¶] . . . [That juror has shown] an unwillingness to [engage in] the deliberation process. We have all put our questions and discussions and everything out there, and there is just a simple unwillingness to even look at evidence or discuss

testimony or discuss the law." Juror No. 7 admitted this juror discussed the case at first, but after the first vote was taken, the juror did not participate in deliberations.

Juror No. 3 believed everyone on the jury had engaged in deliberations. Juror No. 8 somewhat agreed with Juror No. 7 that not all jurors deliberated, but when asked, "[D]id everybody at some point sit down and talk about the facts of the case, relate the evidence and the law to it, and then make a decision whether it was different from everyone else or not?", he responded, "Yeah, I think so."

Juror No. 9 said, "There's probably three or four [jurors] that do very little talking," and "there are particularly two people who don't bother to go through any of the paperwork, or they're listening, but don't make any comments." Asked if he got the "impression" the two holdout jurors came into deliberations "with a preconceived notion of this is how they were going to vote," Juror No. 9 said, "Yes. And it hasn't changed since yesterday." Two other jurors, No. 2 and No. 8, agreed with this sentiment.

Juror No. 10 said all of the jurors "participated in their own way." Asked whether he felt the holdout jurors had a "preconceived notion," he stated, "I think when they walked in they start[ed] forming their opinions after closing arguments and said, 'Okay, here are my ideas,' and we started to discuss it. And I think early on their opinion came through."

Juror Nos. 11 and 12 believed everyone on the jury had participated in deliberations. Juror Nos. 2 and 7, however, did not believe the holdout jurors "active[ly] participated" in deliberations.

The trial judge concluded the jurors were sending "mixed signals" on whether all jurors deliberated. The prosecutor suggested interviewing the jurors individually in chambers, but Esparza's attorney urged the court to order the jurors to resume deliberations without any further questioning and wait to see if they reached a verdict. The judge said he was leaning toward defense counsel's proposal, but wanted to think things over and make a final decision in the morning.

The following morning, the trial court informed counsel, "I've changed my thoughts as to how we should proceed with the jury. . . . I heard one or more of the jurors indicate that one or both [of the holdouts jurors are] not going to believe a witness. Okay. That's deliberating. If you don't believe the credibility or believability, I mean, you could sit down and look at the facts. And it sounds like they've all discussed the facts. Not a lot after [the conspiracy count]. That's still deliberating." But the court said it wanted to nail that issue "down a little tighter" by talking privately to some of the jurors, including the two holdouts.[1]

Esparza's attorney objected, pointing out the court already declared the jurors had been deliberating. She also argued, "I think to continue to speak with them individually or as a group, and then sending them back to deliberate, sends a signal that there is something wrong with the two individuals who are not in agreement with the majority." The court responded, "my sense from everything I've heard yesterday is yes, they are deliberating. But, candidly, I'm . . . just not there yet." And "I don't have a good enough handle on it yet to make that call**."** The court decided to interview several jurors individually in chambers with counsel present.

b. Inquiry of Individual Jurors

The foreperson, Juror No. 1, felt everybody on the jury had been deliberating. The juror did not believe the jury would be able to reach a verdict because the holdout jurors did not believe Alejandro's testimony. Juror No. 1 volunteered that some of the jurors asked the holdout jurors about the other evidence in the case, but the holdout jurors insisted, "'It doesn't matter because [Alejandro] is lying.'" The juror declared the holdout jurors engaged in deliberations, but did more listening than talking.

[1] At that point, the identity of the holdout jurors had not been revealed, but the prosecutor said she had a pretty good idea who they were based on the questioning that had taken place.

When the court asked the juror who they were, she identified them as Juror Nos. 3 and 11.

The court then turned the questioning over to counsel. Esparza's attorney did not have any questions, but the prosecutor wanted to know "was there initially a vote or did initially people give their opinions?" Juror No. 1 said, "No, we decided we were not going to take a vote, that we needed to discuss it all and get a good overview." The court asked: "Did any of the two jurors start off with saying, 'Look, I don't believe [Alejandro], period, end of story?'" The juror responded, "Not when they first came in." The court followed up, "How did it get into that?" The juror responded that the jurors initially talked about Alejandro's testimony, and the two holdout jurors explained they did not believe Alejandro was credible, and therefore they did not believe defendants were guilty. The juror also said, "[T]here is some cultural difference with the jury, and these two particular people. I don't know how to say this. They come from a background where this kind of talk, this kind of behavior – and they expressed this. It's not an opinion of mine – they expressed this kind of interaction [between defendants and Alejandro] is completely normal and not illegal."

The prosecutor asked Juror No. 1 whether the holdout jurors were "saying they didn't think it should be illegal, or was there some discussion about what the law actually – did you talk about what the law was?" Juror No. 1 responded that they discussed the law, but that Juror No. 3 said, "'The law shouldn't . . . be that way because this is how people normally behave. This is how people interact.'" The juror also stated, "She is a bus driver, she has gang members on her bus . . . [and drives] through gang neighborhoods, her uncle is a gang member, and this is just normal activity, it is how people relate."

After the trial court excused Juror No. 1, Esparza's attorney voiced concerns about asking questions that called on the jurors to divulge the content of their deliberations. The court stated it did not want to hear the substance of the jurors'

discussions, but observed it is not always possible to prevent jurors from blurting out unsolicited information.

Juror No. 7 was interviewed next. She said Juror No. 3 was "very expressive" when deliberations began. According to Juror No. 7, after Juror No. 3 made an "initial announcement of her opinion," she said, "'This is where I stand. I've already said my piece, and I don't have anything else to say.'" The court asked: "What was [that] piece?" Juror No. 7 replied, "That she didn't believe any of [Alejandro's] testimony, period." According to Juror No. 7, Juror No. 3 was "outspoken" compared to Juror No. 11, whom Juror No. 7 described as the "silent one."

The prosecutor asked Juror No. 7, "[W]ithout saying what she said, did [Juror No. 3] talk about her reasons for what she thought, or did she just say repeatedly, 'I've said my piece,' and that's it?" Juror No. 7 again explained Juror No. 3's position stemmed from her disbelief of Alejandro's testimony. When the other jurors pointed to other pieces of evidence, they received "no feedback," except "'It's where I'm at, and that's just it?'" Juror No. 7 also said, without any solicitation, that she did not feel the two holdout jurors were ever attacked or bullied by the other jurors.

Juror No. 10 felt everyone gave "their opinion on what they [saw] in the evidence." The sticking point was Alejandro's credibility and whether the defendants had subjected him to any threats or violence. He said "there is definitely not an agreement in that area, and I don't see it changing."

Juror No. 3, the "outspoken" holdout, said everyone on the jury deliberated and considered the evidence. The court asked if she applied the jury instructions on judging a witness's credibility. She believed she had followed the instructions, and found Alejandro not credible, which rankled some of the other jurors. She volunteered that some other jurors would bring up other evidence and when "I would start to speak, and then they would start attacking me in the sense that they would say, 'Well, don't you see? Don't you see here, don't you see here?' And then I didn't get to freely speak my mind

on what I had seen and how I felt because every time I kind of opened my mouth then they were like throwing things at me. And then I kind of just said, 'I'm not going to say anything.'" She stated she listened to the other jurors with an "open mind," but they failed to convince her she was wrong.

Juror No. 11, the "silent" holdout, believed she had participated in the deliberations. After hearing the comments of her fellow jurors, however, she realized she would have to start speaking up more. She assured the court, "I have been in there listening to them, and listening to their opinion. I have my opinion. Perhaps to them I wasn't vocal enough, so I can go in there and be more vocal with them. [¶] Is that going to change my mind? No." The court asked if the jurors discussed the evidence, and she answered, "Yes." The court followed up: "And you still came to the conclusion that you came to in your mind after hearing that discussion?" She answered, "Yes."

The trial court found that all jurors deliberated.

2. Analysis

Where a trial court has "questions whether all of the jurors [were] participating in deliberations," the best practice for the court is "to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations before making further inquiries that could intrude upon the sanctity of deliberations." (*Cleveland*, 25 Cal.4th at p. 480.) As the high court explained, "It is difficult enough for a trial court to determine whether a juror actually is refusing to deliberate or instead simply disagrees with the majority view. [Citations.] Drawing this distinction may be even more difficult for jurors who, confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those individuals who steadfastly disagree with them are refusing to deliberate or are intentionally disregarding the law." (*Engelman*, *supra*, 28 Cal.4th at p. 446.) Only "when reinstruction does not resolve the problem and the court is on notice that there

may be grounds to discharge a juror during deliberations, . . . must [it] conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist." (*Ibid*.)

Rather than reinstruct the jurors and direct them to resume deliberations, the trial court decided to investigate whether all jurors participated in deliberations. The Supreme Court has cautioned the nature of this investigation requires trial courts to proceed "'with care so as to minimize pressure on legitimate minority jurors.' [Citation.]" (*Cleveland, supra,* 25 Cal.4th at p. 478.) The inquiry into possible juror misconduct "should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*Cleveland,* 25 Cal.4th at p. 485.) Nevertheless, "the decision whether (and how) to investigate rests within the sound discretion of the court. [Citations.]" (*Engelman, supra,* 28 Cal.4th at p. 442.)

Here, the trial court impermissibly intruded into the jury's deliberative process because it asked numerous questions that delved into the contents of the jury's deliberation. For example, the court asked Juror No. 1, "Did any of the two jurors start off with saying, 'Look, I don't believe [Alejandro], period end of story?'" After Juror No. 7 volunteered that a holdout juror had stated, "This is where I stand. I've already said my piece, and I don't have anything else to say," the court asked, "Okay. What was the piece that she said?" The court asked Juror No. 10 whether the holdouts discussed the credibility of a witness. In questioning Juror No. 3, one of the holdouts, the court asked whether the juror believed she was following the jury instructions on assessing credibility. In questioning Juror No. 11, the other holdout, the court asked whether the juror discussed the evidence and "still came to the conclusion that you came to in your

mind after hearing that discussion?" Because the court's questions impermissibly intruded into the deliberative process, we find an abuse of discretion.

The trial court also permitted the prosecutor to question the jurors, a practice discouraged by the high court. (See *Cleveland*, *supra*, 25 Cal.4th at p. 485 ["We also observe that permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted."].) As if to validate the Supreme Court's warning, the prosecutor also asked intrusive questions that delved into the contents of the jury's deliberation. For example, the prosecutor asked Juror No. 1 for further details of Juror No. 3's statements during deliberations. The prosecutor asked Juror No. 7, "As to [Juror] number 3, without saying what she said, did she talk about her reasons for what she thought, or did she just say repeatedly, I've said my piece, and that's it? Because that's the part I'm not certain about?" In responding to this question, the juror disclosed what Juror No. 3 actually said during deliberations. Although framed as a limiting question, it is not reasonable to expect a juror to limit his or her response. The court or the prosecutor should have stopped the juror before she revealed the full details about Juror No. 3's comments during deliberations. (Cf. *People v. Lomax* (2010) 49 Cal.4th 530, 592 [trial court's inquiry into juror misconduct was sufficiently restrained where, among other reasons, "[t]he record reflects that the court admonished jurors to avoid inappropriate topics and intervened if their answers threatened to go too far afield."].) In sum, the court impermissibly intruded or permitted the prosecutor to intrude into the jury's deliberative process.

C. *Removal of Juror No. 3*

1. Relevant Facts

As noted, after questioning several jurors in chambers, the trial court concluded all jurors had deliberated. Before the court could send the jury back for further deliberations, it learned that Juror No. 2 wanted to speak privately with the court. Juror No. 2 said the reason she wanted to talk was "that I don't know if it was mentioned

during the jury selection process or not," but Juror No. 3 had mentioned her uncle was a gang member, and graffiti was not scary because it was common in her neighborhood.

After excusing Juror No. 2, the court voiced concern Juror No. 3 may have improperly concealed her experience with gang members during voir dire. Unable to recall the particulars of voir dire, the court was curious as to whether Juror No. 3 was ever asked about those experiences, or if she ever disclosed them to the court. The prosecutor said she had asked every group of prospective jurors whether they had any experience with gang members. Whether Juror No. 3 ever volunteered this information, the prosecutor declared, "She did not . . . . I only do gang cases, . . . and I don't ordinarily automatically kick someone just because they [know] gang [people], but if she had [disclosed her experience with gang members] I would have written it down, and I didn't."

Contrary to the prosecutor's representation, the record shows she did not ask Juror No. 3 about her experience with gang members. While the prosecutor asked the first four groups of prospective jurors that question, she did not pose it to the fifth and final group, of which Juror No. 3 was a member. In fact, at no point was Juror No. 3 directly asked about her experience with gangs or gang members.

The court called Juror No. 3 for additional questioning. Juror No. 3 admitted that, during deliberations, she did mention the fact her uncle was a gang member "years ago." Asked why she did not reveal that information during voir dire, she said, "So when we got picked we were the second day, and then we sat down. And then I sat in the back, and then . . . it just kind of all went fast. And then everybody was like, 'Oh, I don't have nothing to say,' and 'I don't have nothing to say.' And I didn't think about my uncle at that time. We don't hang out, you know. [¶] . . . [¶] Even now we don't have any relationship with each other. We don't associate with each other."

Juror No. 3 also admitted she grew up in a gang neighborhood and used that experience in defending her position to the majority jurors. For example, she told

them she did not consider graffiti threatening because she saw graffiti in her neighborhood when she walked to school as a youngster. She also told her fellow jurors gang members can be intimidating based solely on their appearance. Thus, Alejandro's fear of defendants could have stemmed simply from the way they looked, as opposed to anything they said to him. Juror No. 3 also cautioned her fellow jurors not to read too much into defendants' statements because gang members have their own way of talking and communicating with each other.

When the court asked Juror No. 3 if she had any experience with gang members as part of her job, she said, "I don't work with gang members, but they do get on my bus. . . . [¶] . . . [¶] . . . I don't know if they're gang members, they're just people that get on, they have tattoos." She said that topic came up when the jury was discussing the characteristics of gang members. Some jurors said a person with a tattoo is a gang member, and she responded that "people like that get on my bus all the time."

After ending Juror No. 3's interview, the court and counsel conferred out of the jury's presence. The court stated, "I'm not totally convinced [there was any misconduct] from what I'm hearing . . . because we do kind of rush it, unfortunately, towards the end in jury selection. I know that. But still, that's still a big answer." The prosecutor suggested the court review the reporter's transcript of voir dire to see which particular questions Juror No. 3 was asked. The court did not take up that suggestion, but recalled asking all of the prospective jurors one last "magic question" at the end of the jury selection process. The question was, "Is there anything you haven't told us that you think is important as to why you should not serve as a juror on this case?"

The prosecutor stated that even if Juror No. 3 had disclosed her experience with gang members, she would not necessarily have targeted her for removal. The prosecutor said, "I wouldn't think it's a big deal. . . . I wouldn't kick her. I don't kick everyone that grew up in a gang neighborhood. But if you grow up in a gang neighborhood, and you think it's no big deal, that's the problem. [¶] I still had 16

peremptories. My big issue with her is the fact that she hid this information," when several of the other prospective jurors were very forthcoming about their experience with gang members.

The court agreed, saying, "You can't keep that information in. And [Juror No. 3] had every opportunity to give it." It concluded Juror No. 3's failure to disclose her experience with gang members was "misconduct with a neon sign around it." The court decided to remove her from the jury, although it did not expressly find Juror No. 3 intentionally withheld relevant information.

When explaining his decision to the juror, the court asked the juror if she heard his so-called "magic question," and she said "yes." Then he told her, "I understand what you were saying when you said . . . it was . . . a rush at the end. And that kind of does happen. That's one of the reasons I ask that magic question at the end. [¶] With that, I think you did . . . fine. I am not suggesting that you were lying or anything like that. What I'm saying is it was something that the attorneys should have had an opportunity to talk to you about, because it is a gang case, . . . and you had that information. [¶] . . . [Y]ou're still a very good person. No question. Okay? And I mean that."

Esparza's counsel moved for a mistrial on the grounds (1) the court had invaded the sanctity of the deliberative process by asking the individual jurors questions that "opened the door [] to communications that we should not have necessarily been privy to," and (2) Juror No. 3 was removed from the jury without just cause and her removal was going to have a chilling effect on Juror No. 11 in that it would deter her from disagreeing with the other jurors for fear of being removed herself.

The court denied the mistrial motion. As to the removal of Juror No. 3, the court stated, "I can't count the number of times the gang issue was brought up during the jury selection process by me as well as the prosecutor. It was there. And it was just – I don't know how else I can say it, it was just there."

As to Juror No. 11, the court suggested she be recalled and questioned whether the removal of Juror No. 3 would pressure her into changing her mind. Subsequently, the court asked Juror No. 11 whether she would able to deliberate and whether she would feel intimidated. The juror responded she would be able to deliberate and stated that "I would want to go back in there and be more vocal."

2. Analysis

A juror who gives false answers or purposely withholds relevant information during voir dire is subject to discharge by the court. (*In re Hamilton* (1999) 20 Cal.4th 273, 295.) "Falsehood, or deliberate concealment or nondisclosure of facts and attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process." (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929.) "An *unintentional* concealment caused by an honest mistake during voir dire, however, 'cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias.'" (*In re Manriquez* (2018) 5 Cal.5th 785, 797-798.) "'Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court.'" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644.) We will uphold the court's decision to remove a juror under an abuse of discretion standard "'if the record supports the juror's disqualification as a demonstrable reality.'" (*People v. Williams* (2013) 58 Cal.4th 197, 292.)

As our Supreme Court has explained, the demonstrable reality test is "more comprehensive and less deferential" than the substantial evidence standard. "It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually

relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides." (*Barnwell*, *supra*, 41 Cal.4th at pp. 1052-1053; accord, *People v. Duff* (2014) 58 Cal.4th 527, 560 [the "'demonstrable reality'" test asks whether the evidence actually relied upon by the trial court was sufficient to support the stated basis for its decision].)

A review of the entire record does not show to a "'demonstrable reality'" that Juror No. 3 intentionally withheld gang-related information. We begin by noting that neither the trial court nor the prosecutor specifically asked Juror No. 3 about her experience with gangs.

In addition, the generic questions that were asked did not put Juror No. 3 on notice that she should disclose gang-related information. *Nelson*, *supra*, 1 Cal.5th 569, is instructive. In *Nelson*, the trial court removed a juror because it found juror A.H. had intentionally withheld information on her juror questionnaire regarding "her revolver, her health problems, and her acquaintance with individuals who had been in custody." (*Nelson*, *supra*, 1 Cal.5th at p. 567.) Although the Supreme Court did not resolve whether the juror was improperly excused, it expressed doubt that the trial court had demonstrated the juror intentionally withheld material information when filling out the juror questionnaire. The court explained: "Regarding her ownership of a gun—a subject of questions Nos. 15 and 34 of the juror questionnaire—A.H. explained that she had forgotten about the gun because it had been in storage for years and she had not seen it in five or six years. As to her bipolar illness, . . . the juror questionnaire's phrasing of the health question—'Do you have any specific health problems or disabilities?'—could have been understood by her to refer to physical disabilities only, and in fact, the juror answered that she had 'digestive problems.'" (*Id*. at p. 572.) "On the issue of whether A.H. knew individuals in custody, the question at issue asked, 'Have you, or anyone *close* to you, ever been arrested for or accused of a crime?' (Italics added.)" (*Ibid*.) Although the juror later disclosed that her former babysitter's son and her former brother-

in-law also had been in custody, "[t]he juror may quite reasonably have thought neither of these individuals—an ex-babysitter's son and an ex-brother-in-law—were 'close' to her for purposes of having to disclose them in response to the question. In short, it is not evident that the juror affirmatively misrepresented or concealed material information. Her responses appear to be either the result of inadvertence or a reasonable interpretation of the questions asked on the questionnaire." (*Id.* at pp. 572-573.)

Here, the record indicates Juror No. 3's nondisclosure "appear[s] to be either the result of inadvertence or a reasonable interpretation of the questions asked." As to the trial court's "magic question" ("Is there anything you haven't told us that *you think* is important as to why you should not serve as a juror on this case?"), Juror No. 3 reasonably could interpret it to ask about her subjective feelings on the importance of any information. The juror could conclude that a distant uncle, a childhood experience, and encounters with possible gang members would not preclude her from being a fair juror. Indeed, both the trial court and the prosecutor stated that the juror's gang-related experience would not necessarily prevent her from being on the case. (See *People v. Dyer* (1988) 45 Cal.3d 26, 59 [no concealment found where the voir dire questions on the subject matter at issue were ambiguous].)

The Attorney General notes that Esparza's counsel asked Juror No. 3 and other prospective jurors, "Was there anything that anybody thought I should know about? Anything that we talked about earlier, red flags, anything from any of you new people?" Juror No. 3 reasonably could have interpreted defense counsel's questions as asking for disclosure of what the juror believed was significant information, and she did not recall any such information. (See *People v. Jackson* (1985) 168 Cal.App.3d 700, 705-706 [insufficient grounds to remove a juror who had failed to respond to defense attorney's voir dire question: "'Is there anybody in the jury who up to this point has had anything in their background come to mind who's wondering if I asked you a question where you would have to tell me about it?'"].)

The trial court declared Juror No. 3 was not "lying or anything like that" and told her she was a "very good person." Its statements are contrary to an implicit finding Juror No. 3 intentionally concealed information. The juror testified the vague questions directed at the panel occurred toward the end of jury selection when everything "just kind of all went fast." The court credited the juror's recollection of events. The juror also explained she had forgotten about her uncle because she did not "hang out" with him or have any relationship with him. This is similar to juror A. H.'s explanation that she had forgotten she owned a revolver because it was in storage and she had not seen it for five to six years. (*Nelson, supra,* 1 Cal.5th at p. 572.) Here, the record shows only an inadvertent nondisclosure. Indeed, the court never expressly found whether Juror No. 3's nondisclosure was intentional or inadvertent; instead, the court focused on how important it was for the lawyers to assess Juror No. 3's information so they could decide whether to excuse her. (See *Barnwell, supra,* 41 Cal.4th at p. 1053 ["[i]n taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality"].) Thus, it would be reasonable for Juror No. 3 to not recall her distant uncle at the conclusion of a lengthy voir dire process that became, as the court acknowledged, "a rush at the end." As in *Nelson,* it is not evident Juror No. 3 affirmatively misrepresented or concealed material information. Consequently, the record does not support to a demonstrable reality the trial court's decision to remove Juror No. 3.[2]

[2] The Attorney General attempts to justify Juror No. 3's removal under the standard applicable to unintentional concealment. The argument is relegated to a footnote and is premised on considerations the judge did not rely upon in making his decision, e.g., Juror No. 3 "disagreed with the law." The Attorney General's cursory treatment of the argument suggests it is not very compelling. We therefore reject the argument. (See also *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 71 ["We may decline to address arguments made perfunctorily and exclusively in a footnote"].)

D. *Prejudice*

The trial court erred in intruding into the jury's deliberative process to inquire about juror misconduct, and improperly removed Juror No. 3. Both errors were prejudicial. The improper removal of a holdout juror mid-deliberations is prejudicial and requires reversal of the judgment. (*Cleveland*, 25 Cal.4th at p. 486.)

In *Nelson*, the high court explained that a trial court's erroneous intrusion into the deliberative process prejudices a defendant because of the coercive effect questioning has on *all* jurors to achieve unanimity. (*Nelson*, *supra*, 1 Cal.5th at pp. 571-572.) The high court stated the inquiry into the jury's deliberative process itself could distort the process. (See *id.* at p. 571 [""""[T]he mere suggestion that the views of jurors may be conveyed to the parties . . . understandably may cause anxiety and fear in jurors, and distort the process by which a verdict is reached . . .."""].) The court concluded that there was a reasonable possibility that the inquiry into jurors' views in *Nelson*, *supra*, "would discourage jurors from taking or maintaining the minority position." (*Id.* at p. 572.) According to the court, "Under the circumstances presented above, there is a reasonable possibility that these intrusions into the jurors' deliberative process suggested to the jurors the following: (1) the majority position was the reasonable one; (2) the dissenting jurors' position was unreasonable and would be subject to particular scrutiny—an inference that could only have been strengthened when the court, without explanation to the jury, excused one of the two holdout jurors; and (3) the 'new' deliberations following the substitution of one holdout would simply be a matter of the majority convincing the last holdout and the new juror to come to its side. There is a considerable possibility that this message would have pressured the remaining holdout juror to reevaluate her position and would have discouraged the alternate juror, whose views until that point were unknown, from taking a minority position. [¶] Moreover, to the extent the majority jurors were also continuing to deliberate, and there was a

possibility that they too could change their minds . . . , the questionnaire and the court's remarks made any such conversion significantly less likely." (*Id.* at p. 573.)

The same concerns are present here. The trial court's inquiry and the focus on the holdout jurors suggested to all jurors the minority position was not reasonable. The fact the prosecutor questioned the jurors about Juror No. 3's deliberations suggested it was the not guilty holdouts who should change their minds. (See *Nelson*, *supra*, 1 Cal.5th at p. 569 [danger of improper distortion of jury deliberations is increased if the attorneys for the parties are permitted to question individual jurors in the midst of deliberations].) The coercive impact of the inquiry is not just on Juror No. 11 (the remaining holdout), but also on the remaining jurors, including the new juror who replaced Juror No. 3. Thus, aside from the effect on Juror No. 11, there is a reasonable possibility the removal of Juror No. 3 prejudicially affected the other jurors.

III

DISPOSITION

The judgment is reversed.

ARONSON, J.

I CONCUR:

O'LEARY, P. J.

BEDSWORTH, J., Dissenting:

I respectfully dissent. The majority concludes the trial judge invaded the sanctity of the deliberative process and violated defendant Esparza's right to a fair and impartial jury by discharging Juror No. 3 without just cause. Although Juror No. 3 was never specifically asked about her experience with gang members, the record establishes as a demonstrable reality that she committed misconduct by failing to disclose that experience during voir dire. The judge was therefore justified in removing her from the jury. Given the information available to the judge, his investigation into the issue of juror misconduct was completely justified. Despite its expansive scope, the investigation did not violate defendant's fair trial rights and I would affirm the judgment against him.

I. FACTUAL BACKGROUND

A. Jury Selection

Jury selection lasted two days. Over that period, five different groups of prospective jurors from a single venire were called to the jury box for questioning. Even though Juror No. 3 was part of the fifth and final group, we cannot limit consideration of the factual background to the voir dire of that one particular group so I feel constrained to provide an overview of the entire jury selection process in order to give context to the issues before us.

In his opening remarks to the venire, the trial judge explained the case involved gang charges and that both the defense and the prosecution were entitled to a fair trial. To achieve that goal, he said, it was imperative to select jurors who could decide the case based solely on the facts presented without any preconceived notions or biases. The judge also advised everyone to pay attention to what was going on, even when they were not in the jury box. In this regard, the judge stated, "[W]e're going to start asking the first group of 21 people in the jury box a whole bunch of questions,

everyone in the back should listen up very carefully because I promise you some of you in the courtroom – a lot of you – are going to be in this jury box before we finish this today or tomorrow."

The judge then turned his attention to the first group of prospective jurors, telling them, "You heard some of the [charges] involve gang allegations. . . . [¶] . . . If you've ever been involved in any situation, even if I've already talked to you, that involved alleged gang involvement or you know was gang involvement, tell us about it. We just want to know. [¶] If you have any biases because of that, we should know about that too." In response, one of the prospective jurors divulged that some of his coworkers used to be in a gang. He said that did not bother him, though, because they were good people.

Later on, in announcing the lunch break, the judge informed everyone in the venire that if they did not return to the courtroom by 1:30 p.m. they would not be allowed back in and they would have to complete their jury duty another time. The judge said, "the reason for that is . . . because you all have to hear what everyone else says."

When voir dire resumed that afternoon, the prosecutor and Moreno's attorney reminded everyone they were going to be addressing their questions only to the prospective jurors who were sitting in the jury box. But neither of them told the venire members sitting in the audience to tune out what they were saying. To the contrary, the prosecutor made it clear she wanted them to pay attention to what was going on because they might find themselves in the jury box before too long.

One of the things the prosecutor asked was whether anyone "had any experience with gangs, either you took a class in college, . . . you grew up in . . . a gang neighborhood, you had some interactions with gang members at some point?" Several of the prospective jurors said they had, including one who grew up in a "heavily gang city," one whose brother was a gang member, and one whose cousin was a gang member.

When asked if they could put those experiences and connections aside and judge the case fairly, they all said yes. Nonetheless, the prosecutor peremptorily challenged the two who had familial ties to gang members.

After the parties finished their challenges, nine more prospective jurors were called to the jury box. The judge told them, "We didn't want to break our promise. We told you some of you [were] going to be in the jury box." In questioning this group, the prosecutor asked if anyone would have a problem accepting the testimony of a gang expert. She also wanted to know if anyone had "any experience with gangs, either growing up in a gang neighborhood, through [their] work, any personal connections?" Two of the prospective jurors disclosed they had previously served on juries in cases involving gang members, but they said that would not prevent them from being fair and impartial in this case.

Following another round of challenges, nine more prospective jurors were called to the jury box to fill out the third group. After welcoming them to the box, the judge again brought up the gang issue. Speaking to everyone in the venire – not just the prospective jurors sitting in the jury box – he said, "Folks, when I get to you, if you have had any contact or any experience at all with what you believe may have been gangs or gang members, let me know that because the lawyers are going to want to know that too." That prompted several prospective jurors in the third group to disclose their various experiences with gang members.

The prosecutor then asked if there was anyone else who had "experience with gangs in the past who didn't get a chance to say that?" After one of the prospective jurors disclosed he was briefed on gang safety issues during his time in the military, the prosecutor asked, "Does anybody else have any other background with gangs that [has not] already spoken up?" No one responded, so she moved on to another topic.

The fourth group of prospective jurors was called to the jury box toward the end of the day, and there was not much discussion about gangs before the judge released them for the evening. However, when voir dire resumed the next morning, defendant's attorney asked the group, "Was there anything that we discussed yesterday . . . that you felt any of us should know?" One of the prospective jurors replied, "[M]y brother-in-law is involved in gangs. And I didn't say that yesterday. [¶] . . . [¶] And it was bothering me all night. I needed to get it out there."

The judge assured her that was the right thing to do, and Moreno's attorney thanked her for her candor. The prosecutor also expressed her appreciation to everyone who had come forward and disclosed their experiences with, and feelings toward, gang members. She said this information "gives us an idea into who you are and figuring . . . out . . . if you would be a fair juror[.]" With that in mind, she asked if anyone else "had any experience with gangs, either you grew up in a gang neighborhood, classes on gangs, a particular affinity for, perhaps, gang literature, anything like that?" The query did not lead to any further disclosures from the group.

More challenges ensued, and then the fifth and final group, which included Juror No. 3, was called to the jury box for questioning. When the judge asked Juror No. 3 if she had been listening to everything they had been talking about, both "yesterday and today," she said yes. In going over the information on her juror questionnaire, she said she was a city bus driver, had been a battered spouse for several years, and her father had been incarcerated for drug activity when she was a child. Asked if she would have any problem being fair to both the defense and the prosecution, she said, "No. I would be fair." Juror No. 3 did not disclose anything about her experience with gang members, but other people in her group talked about theirs, including one who revealed her brother had been involved in a gang a "long time" ago. When the judge asked this prospective juror

if she could separate her brother's situation from the facts of this case and fairly assess the charges against defendants, she said yes.

In addressing the group, defendant's attorney started out by asking, "Was there anything that anyone thought I should know about? Anything that we talked about earlier, red flags, anything from any of you new people?" No one in the group said a word. The judge posed a similar question after the parties exercised their final challenges and the proposed jury, which included Juror No. 3, was in place. Specifically, he asked the 12 people sitting in the jury box, "Is there anything you haven't told us that you think is important as to why you should not serve as a juror on this case?" Hearing no responses, the judge had his clerk swear them in to hear the case.

B. Deliberations

On the first day of deliberations, about two hours after it received the case, the jury sent the judge a note that signaled possible discord in the jury room. The jurors wanted to know what the duties of the foreperson were, so the judge referred them to CALCRIM No. 3550, which states, "The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard." No other questions were received from the jury that day.

The next morning, the jury asked to hear the lead investigator's testimony regarding his interview with the alleged victim, Alejandro T. About an hour after the readback, the jury informed the judge, "We have at least two jurors who cannot agree with the other ten. We believe we cannot come to a unanimous verdict on [the conspiracy, dissuading, and burglary counts]. Also, can [we make a finding on the street terrorism count] if we cannot come to a verdict on [the other counts]?"

The judge informed the jury in writing that the answer to the second part of its question was no. He then called the jury into the courtroom to discuss the fact they were deadlocked. With all the jurors present, he asked the foreperson, Juror No. 1, if

there was anything he could do to assist the jury in reaching a verdict, and she answered, "No. We've discussed it now for many hours, each count, and there are two persons on the jury that have expressed that they absolutely will not change their minds." She also said the jury had taken about six votes in all; initially the split was 9 to 3, then it went to 10 to 2, where it remained thereafter.

At that point, Juror No. 5 interjected and said the split was 9 to 2 in favor of conviction, with one juror undecided. She told the judge they were having a hard time getting past count 1, the conspiracy count, which is what they spent most of their time on. She did not believe they had fully fleshed out the other counts or that all of the jurors had fully deliberated on all of the counts.

Juror Nos. 3 and 7 agreed the conspiracy count was the sticking point in their deliberations, and according to Juror No. 2, all the counts hinged "on one portion of the trial, and that's what did it." The foreperson concurred with that assessment. She said "there is a large part of the court testimony [the two holdout jurors] do not believe . . . and their mind[s] cannot be changed[.]" No one on the jury disagreed. They all felt a unanimous verdict was unobtainable, even if they took the conspiracy count out of the equation.

Following this initial round of questioning, the prosecutor requested a sidebar, and the judge met with counsel in chambers. The prosecutor said she was concerned whether there had been full and proper deliberations on all of the counts. While recognizing the holdout jurors were entitled to rest their decision on the credibility of the prosecution's evidence, the prosecutor feared they might have made up their mind about the case based on the testimony of a single witness without considering all of the other evidence that was presented, and without considering each and every count that was alleged against the defendants. The judge said he got the impression the jury had in fact deliberated on all of the counts, albeit primarily on the conspiracy count. However, he

also recognized this conclusion was not entirely clear from the jurors' statements. Therefore, he decided to make further inquiry into that issue.

Returning to the courtroom, the judge asked each of the jurors "are you of the opinion that all 12 jurors actually deliberated on all counts?" The judge defined deliberating as reviewing the evidence and the law, analyzing the case, and discussing each other's opinions. He also said that if a juror makes up his mind after doing those things, he does not have to keep justifying his position to the other jurors; instead, he can simply "turn[] his chair around, move[] into the corner, and face[] the wall." In other words, "disagreeing, even early on, does not equal not deliberating necessarily." However, it would not be okay for a juror to announce his vote right off the bat and then refuse to talk about it any further.[3]

In their initial responses to the court's question, Juror Nos. 1 through 6 said they felt everyone on the jury had engaged in deliberations on all of the counts. However, Juror No. 7 told the judge, "I have to disagree. I think there is one juror that has not given the law and the evidence enough deliberation. [¶] . . . [¶] . . . [That juror has shown] an unwillingness to [engage in] the deliberation process. We have all put our questions and discussions and everything out there, and there is just a simple unwillingness to even look at evidence or discuss testimony or discuss the law." Juror No. 7 admitted this one juror did discuss the case a little bit at first, but after the first vote was taken, she did not participate in deliberations.

Hearing this, Juror No. 3 chimed in: "I personally feel that the two people that didn't find the defendants guilty were kind of, in a form, attacked. And so maybe one of [those people] was getting . . . questioned [more], maybe that person was more open to speak, and the other person that was in agreeance with that one person . . . didn't

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[3] It is difficult to imagine how the court could have addressed this issue in a manner more respectful of the holdout jurors and their right to dissent.

speak that much. But when the moment came to agree or disagree, then it was clear that there was two that weren't going to say yes," i.e., vote to find the defendants guilty. Contrary to how Juror No. 7 felt, Juror No. 3 said she believed everyone on the jury had engaged in deliberations.

The judge then asked Juror No. 8 for his opinion, and he said, "In some ways I would have to agree with [Juror No.] 7." Asked to elaborate, Juror No. 8 had a hard time putting his finger on the issue. He said that during deliberations they were all trying to focus on the task at hand, but "maybe there were a couple who didn't." At that point, the judge explained that deliberations can sometimes involve nonverbal forms of communication, and it is natural for some jurors to talk less than others. He then asked Juror No. 8, "[D]id everybody at some point sit down and talk about the facts of the case, relate the evidence and the law to it, and then make a decision whether it was different from everyone else or not?" "Yeah, I think so" was his response.

The court then came back to the foreperson and asked her the same question. She replied, "I think that the one juror that is being discussed had already formulated an opinion and expressed that opinion early on, and is not believing some of the testimony, and, because of that, is refusing to see the evidence as being evidence under the law. And as we're discussing the law as provided to us in the jury instructions, they're being more, I think, emotional about it than rational, and not using the law [to decide] did this violate this or did this not violate this. They're not looking at that, they're looking at more how do they feel about it." Asked if the two holdout jurors ever talked about the law and explained why they felt it did not apply to the facts of the case, the foreperson said, "One did, the other did not."

Speaking to that issue, Juror No. 9 said, "There's probably three or four [jurors] that do very little talking," and "there are particularly two people who don't bother to go through any of the paperwork, or they're listening, but don't make any

comments." Asked if he got the impression those two jurors came into deliberations with a preconceived notion of how they were going to vote, Juror No. 9 said, "Yes. And it hasn't changed since yesterday." Two other jurors, No. 2 and No. 8, agreed with this sentiment.

Juror No. 10 then gave his take on things. He said there was frustration in the jury room due to a difference of opinion over the credibility of a particular witness. However, in his opinion, all of the jurors "participated in their own way."

Juror Nos. 11 and 12 said they also felt as though everyone on the jury had participated in deliberations. Describing what took place, Juror No. 12 said, "We kind of asked around. If we didn't hear from some of the people, then we would ask. . . . [O]ne of the problems that we had . . . is when somebody was talking and somebody had something else to say, somebody else came and talked over [them]. But that's okay. We kind of got that under control after the first day. So that was a little bit difficult to follow. But other than that, I think we have a really good group."

Rejoining the discussion, Juror No. 7 said she did not see it that way. In her view, neither one of the holdout jurors actively participated in deliberations, even when they were asked to do so. Juror No. 2 also came around to this view, although, as noted, she initially told the judge that everyone on the jury had engaged in deliberations.

Sensing the jurors were sending "mixed messages," the judge excused them for the evening and turned to the attorneys for guidance on how to proceed. The prosecutor suggested interviewing the jurors individually in chambers, so they would feel more comfortable talking about their deliberations. But defendant's attorney wanted the judge to order the jury to resume deliberations without any further questioning, in the hope they would be able to work things out for themselves. Expressing his faith in the jury, the judge said he was leaning toward defense counsel's proposal. However, he wanted to think things over and make a final decision in the morning. Before adjourning

for the evening, he told counsel, "We will see. I don't think there is a right or wrong on this at this point."

The following morning, the judge informed counsel, "I've changed my thoughts as to how we should proceed with the jury . . . . I heard one or more of the jurors indicate that one or both [of the holdouts jurors are] not going to believe a witness. Okay. That's deliberating. If you don't believe the credibility or believability, I mean, you could sit down and look at the facts. And it sounds like they've all discussed the facts. Not a lot after [the conspiracy count]. That's still deliberating." However, the judge said he wanted to nail that issue "down a little tighter" by talking privately to some of the jurors, including the two holdouts.[4]

Defendant's attorney opposed this idea. She argued, "I think it was quite clear that they said they had two individuals on the jury who had problems with the credibility of at least one of the witnesses, which, . . . as the court said, that's deliberation. I think to continue to speak with them individually or as a group, and then sending them back to deliberate, sends a signal that there is something wrong with the two individuals who are not in agreement with the majority. Failing to agree with the majority is not failing to deliberate. They're entitled to their individual opinions, and I think at this point things are likely to get more tense."

The judge was sympathetic to these concerns. Yet, as the discussion wore on, it became apparent he was still not sure if everyone on the jury was participating in deliberations. He said, "[M]y sense from everything I've heard yesterday is yes, they are deliberating. But, candidly, I'm . . . just not there yet." And "I don't have a good enough handle on it yet to make that call." So, he decided to start interviewing the jurors individually in chambers with counsel present.

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[4] At that point, the identity of the holdout jurors had not been revealed, but the prosecutor said she had a pretty good idea who they were based on the questioning that had taken place thus far.

The first juror to be interviewed was the foreperson. Asked if she felt everybody on the jury had been deliberating, she said yes, but because two of the jurors did not believe Alejandro's testimony, she did not think they would be able to reach a unanimous verdict. Describing how the deliberations proceeded once the holdout jurors made their opinion about Alejandro's testimony known, the foreperson said some of the jurors asked them about the other evidence in the case, but they insisted, "'It doesn't matter because [Alejandro] is lying.'" All in all, the foreperson felt the holdout jurors did more listening than talking. When the judge asked her who they were, she identified them as Juror Nos. 3 and 11.[5]

The judge then turned the questioning over to counsel. Defendant's attorney did not have any questions for the foreperson, but the prosecutor wanted to know when the jury began to fracture. The foreperson said there was general agreement when they were discussing the case early on. But when they started talking about Alejandro's testimony regarding how the defendants had allegedly threatened him, the two holdout jurors said they did not believe Alejandro was credible, and therefore they did not believe defendants were guilty.

Continuing, the foreperson volunteered, "[T]here is some cultural difference with the jury, and these two particular people. I don't know how to say this. They come from a background where this kind of talk, this kind of behavior – and they expressed this. It's not an opinion of mine – they expressed this kind of interaction [between defendants and Alejandro] is completely normal and not illegal." Describing how Juror No. 3 saw the case, the foreperson stated, "She is a bus driver, she has gang members on her bus . . . [and drives] through gang neighborhoods, her uncle is a gang member, and this is just normal activity, it is how people relate." The foreperson also

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[5] As it turned out, both of those jurors worked for the Orange County Transit Authority. Juror No. 3 was a bus driver, and Juror No. 11 was her supervisor.

reported that when they were talking about the law the judge had provided them, Juror No. 3 said, "'The law shouldn't . . . be that way because this is how people normally behave. This is how people interact.'"

After the judge excused the foreperson from his chambers, defendant's attorney voiced concerns about asking questions that called on the jurors to divulge the content of their deliberations. The judge was sensitive to that issue, indicating the substance of the jurors' discussions was off limits. However, he also observed it is not always possible to prevent jurors from blurting out unsolicited information.

Juror No. 7 was interviewed next. She said Juror No. 3 was very expressive when deliberations began but hardly contributed to the conversation after voicing her initial opinion about the case. When the judge asked what Juror No. 3's initial opinion was, Juror No. 7 replied, "That she didn't believe any of [Alejandro's] testimony, period. Other jurors . . . attempted to explain to her that you can believe all, none [or] some [of Alejandro's testimony] . . . hoping we [could] make some progress. That didn't happen." Even the readback of the lead investigator's testimony of his interview with Alejandro did nothing to break the stalemate. According to Juror No. 7, Juror No. 3 simply wasn't willing to engage in meaningful discussion after making her initial opinion known.

As little as Juror No. 3 engaged with the other jurors, Juror No. 7 said she was "outspoken" compared to Juror No. 11, whom she described as the "silent one." According to Juror No. 7, Juror No. 11 just sat there in crossed-armed silence when the other jurors asked her questions and tried to engage her in conversation.

Following up on the judge's questions, the prosecutor asked Juror No. 7, "[W]ithout saying what [was] said, did [Juror No. 3] talk about [the] reasons for" her position? Juror No. 7 said Juror No. 3's position stemmed from her disbelief of Alejandro's testimony. And Juror No. 11 never explained her position at all, even when

other jurors tried to draw her out. Contrary what Juror No. 3 had told the judge, Juror No. 7 said she did not feel as though the two holdout jurors were ever attacked or bullied by the other jurors.

The next juror to be questioned was Juror No. 10. Consistent with his previous statements, he said everybody on the jury had discussed all of the counts. While some talked more than others, Juror No. 10 felt everyone gave "their opinion on what they [saw] in the evidence." The sticking point, he said, had to do with Alejandro's credibility and whether the defendants had actually subjected him to any threats or violence. He said "there is definitely not an agreement in that area, and I don't see it changing."

Juror No. 3 was next up. She said everyone on the jury deliberated and considered the evidence. Applying the rules regarding witness credibility, she simply did not feel Alejandro's testimony was believable, which rankled some of the other jurors. Explaining how things played out, Juror No. 3 said, "They would ask me a question on why I felt a certain way, and then I would start to speak, and then they would start attacking me in the sense that they would say, 'Well, don't you see? Don't you see here, don't you see here?' And then I didn't get to freely speak my mind on what I had seen and how I felt because every time I kind of opened my mouth then they were like throwing things at me. And then I kind of just said, 'I'm not going to say anything.'"

Juror No. 3 further stated that, even though the other jurors were somewhat hostile toward her, she was able to express some of her thoughts to them. She also listened to what they were saying and kept an open mind about the case. But they failed to convince her she was wrong, so she stuck to her guns and continued to vote not guilty. Given all they had been through, she did not believe she and her fellow jurors would be able to unanimously agree on a verdict.

Juror No. 11, the so-called "silent" holdout, was questioned next. She said she felt like she had been participating in the deliberations. However, she admitted she had not been very vocal, and after hearing the comments of her fellow jurors the previous day, she realized she was going to have to start speaking up more. Despite her reticence in the jury room, she assured the court, "I have been in there listening to them, and listening to their opinion. I have my opinion. Perhaps to them I wasn't vocal enough, so I can go in there and be more vocal with them. [¶] Is that going to change my mind? No."

After excusing Juror No. 11 from chambers, the judge said he was convinced the jury had been deliberating, and therefore he was going to send them back into the jury room. However, as soon as he uttered those words, he received notice that Juror No. 2 wanted to speak to him in chambers. Their ensuing conversation changed the course of the proceedings dramatically.

Asked what was on her mind, Juror No. 2 expressed concern the two holdout jurors "were letting emotion sway them versus actually looking at and evaluating [the] evidence and applying the law." She also said Juror No. 3 had mentioned her uncle was a gang member, graffiti is common in her neighborhood, and she did not see anything wrong with the way defendants acted toward Alejandro.

As for Juror No. 11, Juror No. 2 stated the only thing she said during deliberations was that she could never look herself in the mirror if she voted to find the defendants guilty. Although other jurors tried to draw her out, she was not forthcoming in terms of explaining her position. Juror No. 2 also sensed the two holdout jurors "didn't agree with the law and how it was applied." For example, Juror No. 3 seemed to have a problem applying the law of burglary to the facts of this case because, in her mind, "burglary is when you steal something," and defendants did not do that.

Upon excusing Juror No. 2 from chambers, the judge voiced concern Juror No. 3 may have improperly concealed her experience with gang members during voir dire. Unable to recall the particulars of voir dire, the judge was curious as to whether Juror No. 3 was ever asked about those experiences, or if she ever disclosed them to the court. The prosecutor said she had asked every group of prospective jurors whether they had any experience with gang members, but that was not correct; she did ask the first four groups of prospective jurors that question, but she did not pose it to the fifth and final group, of which Juror No. 3 was a member. In fact, at no point was Juror No. 3 directly asked about her experience with gangs or gang members.

With respect to whether Juror No. 3 ever volunteered this information, the prosecutor stated, "She did not . . . . I only do gang cases, . . . and I don't ordinarily automatically kick someone just because they [know] gang [people], but if she had [disclosed her experience with gang members] I would have written it down, and I didn't." The prosecutor also expressed concern about Juror No. 3's understanding of the law on burglary. Hoping to find out more about these issues, the judge called Juror No. 3 back into chambers for additional questioning.

Juror No. 3 admitted that, during deliberations, she did mention the fact her uncle was a gang member "years ago." Asked why she did not reveal that information during voir dire, she said, "So when we got picked we were the second day, and then we sat down. And then I sat in the back, and then . . . it just kind of all went fast. And then everybody was like, 'Oh, I don't have nothing to say,' and 'I don't have nothing to say.' And I didn't think about my uncle at that time. We don't hang out, you know. [¶] . . . [¶] Even now we don't have any relationship with each other. We don't associate with each other."

In response to further questioning, Juror No. 3 admitted she grew up in a gang neighborhood and used that experience in defending her position to the majority

jurors. For example, she told them she did not consider graffiti threatening because when she walked to school as a youngster, she saw graffiti in the neighborhood. She also told her fellow jurors gang members can be intimidating based solely on their appearance. Thus, Alejandro's fear of defendants could have stemmed simply from the way they looked, as opposed to anything they said to him. Juror No. 3 also cautioned her fellow jurors not to read too much into defendants' statements because gang members have their own way of talking and communicating with each other.

When the judge asked Juror No. 3 if she had any experience with gang members as part of her job, she said, "I don't work with gang members, but they do get on my bus. . . . [¶] . . . [¶] . . . I don't know if they're gang members, they're just people that get on, they have tattoos." She said that topic came up when the jury was discussing the characteristics of gang members. She assured the judge she went into deliberations with an open mind and followed all of his instructions.

With that, the judge excused Juror No. 3 from his chambers and began discussing with counsel whether Juror No. 3 was guilty of misconduct for failing to disclose her experience with gang members during voir dire. Expressing his initial impression of the issue, the judge stated, "I'm not totally convinced [there was any misconduct] from what I'm hearing . . . because we do kind of rush it, unfortunately, towards the end in jury selection. I know that. But still, that's still a big answer." The prosecutor suggested the judge review the reporter's transcript of voir dire to see which particular questions Juror No. 3 was asked. The judge did not take up that suggestion, but he did recall asking all of the prospective jurors what he described as one last "magic question" at the end of the jury selection process. As noted above, that question was, "Is there anything you haven't told us that you think is important as to why you should not serve as a juror on this case?"

Defendant's attorney argued that question did not encompass Juror No. 3's experience with gang members. However, the prosecutor was critical of Juror No. 3 for failing to disclose that experience during voir dire and then using it to support her position during deliberations. Nonetheless, she admitted that even if Juror No. 3 had disclosed her experience with gang members, she would not necessarily have targeted her for removal. The prosecutor said, "I wouldn't think it's a big deal. . . . I wouldn't kick her. I don't kick everyone that grew up in a gang neighborhood. But if you grow up in a gang neighborhood, and you think it's no big deal, that's the problem. [¶] I still had 16 peremptories. My big issue with her is the fact that she hid this information," when several of the other prospective jurors were very forthcoming about their experience with gang members.

The judge agreed, saying, "You can't keep that information in. And [Juror No. 3] had every opportunity to give it." After discussing the issue further with counsel, the judge ultimately came to the conclusion Juror No. 3's failure to disclose her experience with gang members was "misconduct with a neon sign around it." He therefore removed her from the jury. Explaining his decision, the judge said having experience with gang members is not an automatic disqualification to serving on a jury in a gang case, and in fact many "people who come from the hood, so to speak . . . wind up on gang cases." However, a juror cannot keep those experiences hidden because it deprives the attorneys of the opportunity to ask questions about them and to find out how they may have impacted the juror's attitude and perceptions.

When the judge explained this to Juror No. 3, he did so in a sympathetic fashion. First, he asked her if she heard his so-called "magic question" at the end of voir dire, and she said yes. Then he told her, "I understand what you were saying when you said . . . it was . . . a rush at the end. And that kind of does happen. That's one of the reasons I ask that magic question at the end. [¶] With that, I think you did . . . fine. I am

not suggesting that you were lying or anything like that. What I'm saying is it was something that the attorneys should have had an opportunity to talk to you about, because it is a gang case, . . . and you had that information. [¶] . . . [Y]ou're still a very good person. No question. Okay? And I mean that."

The focus of the discussion then turned to Juror No. 11. Satisfied she had been fulfilling her obligation to engage in deliberations, the judge determined there was no reason to remove her from the jury. However, that raised the question of how she was going to respond going forward. Based on her previous answers, the prosecutor was concerned Juror No. 11 was so set in her belief the defendants were not guilty that no matter how the new deliberations unfolded, she would never change her vote, and the case would end in a hung jury. But defendant's attorney had the opposite concern; she feared that if deliberations were restarted, Juror No. 11 would surely succumb to the pressure of the majority jurors and change her vote since she would not have Juror No. 3 by her side for support. After all, it was apparent Juror No. 3 did most of the talking for them when they were in the jury room together.

With these concerns in mind, the judge decided to call Juror No. 11 back into chambers for additional questioning. He asked her whether she would be open to listening to the other jurors on all of the issues if deliberations resumed, and whether she would be willing to change her mind if the other jurors convinced her that her current position was incorrect. She answered yes to both questions, and the judge felt she was being honest and sincere. After dismissing Juror No. 11 from chambers, the judge was convinced she could still be fair and independent.

Believing otherwise, defendant's attorney moved for a mistrial. She felt the judge had invaded the sanctity of the deliberative process by asking the jurors questions that "opened the door to communications that we should not have necessarily been privy to." She also believed Juror No. 3 was removed from the jury without just cause and that

her removal was going to have a chilling effect on Juror No. 11 in that it would deter her from disagreeing with the other jurors for fear of being removed herself.

Moreno's attorney shared these concerns. He also faulted the judge for not reviewing the reporter's transcript of voir dire before deciding whether to remove Juror No. 3 for failing to disclose her experience with gang members. But the judge was unmoved. In defending his decision to remove Juror No. 3, he stated, "I can't count the number of times the gang issue was brought up during the jury selection process by me as well as the prosecutor. It was there. And it was just – I don't know how else I can say it, it was just there." The judge also noted that when he asked Juror No. 3 about the "magic question" he posed to her and the other jurors just before they were sworn in "she just kind of, you know, smiled at that point, knowing that she messed up. At least that was my impression."

With respect to Juror No. 11's ability to remain independent, the judge recognized she might feel somewhat intimidated by not having Juror No. 3 with her in the jury room to help defend her position. Therefore, he decided to call her back into chambers and talk to her one more time before deciding what to do. First, he told her not to consider or speculate why Juror No. 3 was removed. Then he asked her if she would be able to deliberate anew with an alternate juror, and she said yes. After that, he asked her if she felt there was going to be "an intimidation factor" now that Juror No. 3 was no longer on the jury. Juror No. 11 responded, "I feel that if you're to excuse me I would for the rest of my life wonder about the mere fact that it was stated that they felt that some of us did not vocalize enough. And so for that reason I would want to go back in there and be more vocal."

Convinced Juror No. 11 would be able to do that, the judge denied the mistrial motion and ordered the jury to begin deliberations anew with Juror No. 3's replacement. The jury deliberated almost five hours before finding defendants guilty.

II. DISCUSSION

A. Legality of Juror No. 3's Removal

Defendant contended the trial judge undermined his constitutional right to a fair and impartial jury by removing Juror No. 3 without sufficient justification. (See U.S. Const., 6th Amend.; Cal. Const., art. I, § 16.) I disagree.

Trial courts may discharge a juror for good cause if the juror is unable to perform his or her duty. (Pen. Code, § 1089.) "A juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict." (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.) Thus, if shown to be biased at any time during the trial, a juror may be removed from the case. (*People v. Barnwell* (2007) 41 Cal.4th 1038; *People v. Ayala* (2000) 24 Cal.4th 243, 271–272.) Removing a juror under these circumstances does not offend the constitution. (*People v. Wilson* (2008) 44 Cal.4th 758, 820–821.)

The principal safeguard against juror bias is voir dire. It "is the mechanism by which we give substance to the constitutional guarantee to criminal defendants of a fair and impartial jury trial." (*Williams v. State* (Md.Ct.App. 2006) 904 A.2d 534, 542.) However, voir dire can only achieve its intended purpose of exposing potential bias when prospective jurors are forthcoming and truthful in their responses. (*In re Hamilton* (1999) 20 Cal.4th 273, 295.) If they are not, the whole system suffers, not just the defendant: "The prosecution, the defense and the trial court [all] rely on the voir dire responses in making their respective decisions, and if potential jurors do not respond candidly the jury selection process is rendered meaningless. Falsehood, or deliberate concealment or nondisclosure of facts and attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process." (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929; accord, *In re Hitchings* (1993) 6 Cal.4th 97, 111 [false answers

or concealment on voir dire eviscerates the parties' right to challenge prospective jurors who may be biased].)

Consequently, a juror who gives false answers or purposely withholds relevant information during voir dire is subject to discharge by the court. (*In re Hamilton, supra,* 20 Cal.4th at p. 295; *People v. Price* (1991) 1 Cal.4th 324, 399-401.) Indeed, juror bias may be inferred when a juror is found to have intentionally concealed material facts during the jury selection process. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107; *People v. Blackwell, supra*, 191 Cal.App.3d at p. 929.) This is so even if the juror denies any wrongdoing and continues to maintain they can be fair and impartial. (*In re Hitchings, supra,* 6 Cal.4th at p. 120.) In other words, "a juror need not admit a bias for the court to find that it exists." (*People v. Lomax* (2010) 49 Cal.4th 530, 590.)

A juror's inadvertent failure to disclose relevant information may also constitute grounds for removal. (*People v. Wilson, supra,* 44 Cal.4th at p. 823.) ""[T]he proper test to be applied to unintentional 'concealment' is whether the juror is sufficiently biased to constitute good cause for the court to find . . . he is unable to perform his duty."" (*Ibid*.) Under this test, a juror cannot be removed simply because his or her nondisclosure deprived the aggrieved party of its right to exercise a peremptory challenge. (*In re Cowan* (2018) 5 Cal.5th 235, 248; *Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, 948.) Removal is only justified if the information that was withheld by the juror, or other circumstances, evidence actual bias. (*Ibid*.; *In re Manriquez* (2018) 5 Cal.5th 785, 797-798; *People v. Nesler* (1997) 16 Cal.4th 561, 581.)

"Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644.) So is the court's ultimate decision to retain

or remove a juror. (*People v. Cowan* (2010) 50 Cal.4th 401, 506.) We will uphold the court's decision to remove a juror "'if the record supports the juror's disqualification as a demonstrable reality. [Citations.]'" (*People v. Williams* (2013) 58 Cal.4th 197, 292.)

The reason our system accords such wide-ranging discretion to the trial judge is amply demonstrated by this case, in which a laudably conscientious trial judge spent a great deal of time listening to and answering jurors. He was able to evaluate tones of voice, facial expressions, pauses, behavioral manners, all things we have no access to. Our system puts a lot of emphasis on the value of such things. That's why we so zealously guard the Sixth Amendment right to confrontation. Adherence to those principles informs our analysis of this case, but we do not cede the field to the trial court entirely. As our Supreme Court has explained, the demonstrable reality test is more stringent than the substantial evidence standard used in other contexts:

"A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. . . . [¶] The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides." (*People v. Barnwell, supra*, 41 Cal.4th at p. 1052; accord, *People v. Duff* (2014) 58 Cal.4th 527, 560 [the demonstrable reality test asks

whether the evidence actually relied upon by the trial court was sufficient to support the stated basis for its decision].)

Defendant asserted the trial judge's decision to dismiss Juror No. 3 does not pass muster under the demonstrable reality test. To his way of thinking, Juror No. 3 did not commit misconduct during voir dire by failing to disclose her experience with gang members because she was never explicitly asked to do so. He contended the failure to ask *her* the question about gangs *individually* means there was no concealment on her part. And even if she was remiss for failing to disclose that experience, her removal was improper because the nondisclosure was unintentional, and the information she failed to reveal would not have justified her removal for cause. However, I believe Juror No. 3 was properly removed from the jury because there were facts indicating she intentionally concealed material information during the jury selection process.

The threshold question is whether Juror No. 3 concealed pertinent information that was asked of her during voir dire. Obviously, jurors cannot be faulted for failing to disclose information that was not fairly called for during jury selection. (See *In re Hitchings*, *supra*, 6 Cal.4th at p. 116; *People v. Dyer* (1988) 45 Cal.3d 26, 59 [no concealment found where the voir dire questions on the subject matter at issue were ambiguous].) However, concealment can be inferred when the voir dire questioning was sufficiently specific to elicit the information that was allegedly withheld. (*People v. Blackwell, supra,* 191 Cal.App.3d at p. 929.)

Defendant is correct that Juror No. 3 was never asked any specific questions on voir dire about her experience with gangs or gang members. But throughout jury seating the judge and the attorneys emphasized the need for the prospective jurors to disclose anything that might affect their ability to be fair and impartial to either the defense or the prosecution. They were especially interested in knowing about the prospective jurors' experience with, and attitude toward, gangs. Accordingly, they

repeatedly implored the prospective jurors to let them know if they had any connections to gang members or experiences involving gangs.

In seeking this information, the prosecutor asked multiple times whether any of the prospective jurors grew up in a gang neighborhood or had any kind of interaction with or personal connection to gang members. In response to these inquires, one of the prospective jurors revealed she grew up in a city with gangs, and several other prospective jurors disclosed their experience with gang members and/or the fact they had people in their family who were involved with gangs. Those disclosures triggered follow-up questions by the judge and attorneys, and ultimately the prosecutor dismissed two prospective jurors who were related to gang members.

Admittedly, all of this took place before Juror No. 3 was called to the jury box for questioning. However, throughout the jury selection process, the judge and the attorneys repeatedly admonished everyone in the venire to pay attention to what was going on, even when they were not in the jury box, because many of them would eventually end up being questioned there. It appears Juror No. 3 took these admonitions to heart, because after she was called to the box and the judge asked her if she had been listening to everything they had been talking about for the past two days, she answered in the affirmative. This belies defendant's suggestion Juror No. 3 was oblivious to the judge and attorneys' earlier calls for disclosure of gang information.

Furthermore, the record shows several prospective jurors in Juror No. 3's group voluntarily disclosed their experience with gang members, including one who said her brother was in a gang a long time ago. Hearing this, the judge asked her several follow-up questions to ensure she could still be fair and impartial. This exchange illustrated the judge was concerned about potential bias stemming from the prospective juror's familial relationship with gang members. And so did the questioning of several other prospective jurors who disclosed they had people in their family who were in, or

had been involved with, gangs. No one who was present for all of this could have had any question about what was important to the attorneys.

Nevertheless, Juror No. 3 remained silent when defendant's attorney asked her group, "Was there anything that anyone thought I should know about? Anything that we talked about earlier, red flags, anything from any of you new people." She also kept quiet when the judge posed his "magic question" at the end of voir dire in which he asked Juror No. 3 and the 11 other people who had been selected, "Is there anything you haven't told us that you think is important as to why you should not serve as a juror on this case."

Defendant argued this question was too vague to conclude it called for the prospective jurors to reveal their experience with gang members. However, not long before Juror No. 3 was questioned, defendant's attorney asked the proceeding group of prospective jurors, "Was there anything that we discussed yesterday . . . that you felt any of us should know?" That prompted one of the prospective jurors to reveal she had a brother-in-law who was involved in a gang. After she made this disclosure, the judge was quick to assure her disclosing that was the right thing to do, and Moreno's attorney thanked her for her candor. This underscored the importance of disclosure on this issue and is relevant to the broader question of whether Juror No. 3 was justifiably removed for concealing her own experience with gang members. (See *State v. Akins* (Tenn.Crim.App. 1993) 867 S.W.2d 350, 353-358 [in determining whether a juror committed misconduct by failing to disclose certain information during voir dire, the reviewing court considered the questioning that occurred before the juror was seated in the jury box and the general questions that were posed to her group as a whole once she was in the box]; *Pemberton v. Tip Top Plumbing & Heating Co., Inc.* (Mo.Ct.App. 1981) 618 S.W.2d 711, 713 [juror concealment can be established by either direct or circumstantial evidence].)

Granted, the judge's "magic question" asked the prospective jurors to disclose anything *they* thought might implicate their ability to be fair and impartial, which conveyed a subjective standard. But this is really just quibbling over a figure of speech. That question was preceded by a request from defendant's attorney in which she asked for any information the prospective jurors thought *she* should know about. It was clear from the context and questioning of the prospective jurors as a whole that the purpose of voir dire was to facilitate the disclosure of information the *parties*, not just the prospective jurors, might find objectionable or suggestive of a possible bias.

Defendant attempted to draw a parallel between the judge's "magic question" in this case and the "catch-all" question that was criticized in *People v. Jackson* (1985) 168 Cal.App.3d 700 (*Jackson*), but the comparison is weak at best. *Jackson* involved a prosecution for selling marijuana. During voir dire, one of the attorneys asked, "'Is there anybody in the jury who up to this point has had anything in their background come to mind who's wondering if I asked you a question where you would have to tell me about it? This is what's known as the skeleton in the closet question.'" (*Id*. at p. 705.) Describing this question as "inartfully framed," the *Jackson* court said it was "entirely unsure what information counsel was soliciting with [it] or how it could be answered." (*Ibid*.) Therefore, the court found there was insufficient grounds to remove a juror who had failed to reveal during voir dire that his nephew had died from a drug overdose. (*Id*. at p. 706.)

Here, in contrast, the judge's magic question was much more direct and to the point. It simply asked the prospective jurors to reveal anything they believed might impact their ability to serve on the case. On one level, that's a pretty broad question. But considering that a significant portion of the jury selection process was devoted to eliciting information about the prospective jurors' experience with, and attitude toward, gang members, and the fact several members of the venire responded with information about

gangs, I believe the question was sufficiently specific to apprise Juror No. 3 of the need to reveal the fact she grew up in a gang neighborhood, her uncle was a gang member, and her job put her in contact with people whom she believed were gang members. Her failure to do so was misconduct, and the judge was fully justified in finding she engaged in impermissible concealment. (See *Kogan v. Israel* (Fla.Ct.App. 2017) 211 So.3d 101, 106 [juror's nondisclosure of son's arrest constituted improper concealment because it was clear "the parties' main goal during voir dire was to decipher whether any of the panel members held biases towards law enforcement."].) Because that conclusion appears in the record as a demonstrable reality, we are powerless to disturb it.

Not only does the record support a finding of concealment, it also supports a finding of intentionality. As a matter of fact, all things considered, it is hard to see how Juror No. 3's failure to disclose her experience with gang members can fairly be characterized as anything other than deliberate. When interviewed by the judge in chambers, she claimed she did not think about her uncle during voir dire because she does not hang out with him and the questioning went by fast. However, she admitted she heard the judge's magic question and paid attention to voir dire even when she was not in the jury box. And it is evident that once deliberations started, she was quick to invoke her uncle's gang status, as well as her own experience growing up in a gang neighborhood, in defending her position to her fellow jurors.

While there was nothing wrong with Juror No. 3 relying on her life experiences in forming her opinions about the case (*In re Manriquez, supra,* 5 Cal.5th at p. 810), she did not have the right during voir dire to conceal information suggesting a possible bias toward one party or the other, such as her experience with gang members. Viewing the record as a whole, it appears that is precisely what she did, and that is why the judge was justified in removing her from the jury. (Compare *Sanders v. Lamarque, supra,* 357 F.3d at p. 949 [holdout juror improperly dismissed where she "provided

responsive and direct answers to the questions posed to her, . . . was forthcoming with information during voir dire, [and] there was no evidence that she intentionally or unintentionally concealed information"].)

I appreciate the fact that in speaking to Juror No. 3 about why she was being removed from the jury the judge assured her she "did fine," and he was not suggesting she lied by failing to disclose her experience with gang members. But this was rather obviously a well-considered and appropriate attempt to encourage her to be forthright and to spare her feelings. Moments earlier, in speaking with counsel, he had described that failure as "misconduct with a neon sign around it." And he agreed with the prosecutor's assertion that Juror No. 3 "hid" the fact she grew up in a gang neighborhood and had an uncle who was a gang member. As the judge bluntly put it, "You can't keep that information in. And she had every opportunity to give it."

The judge also made a record of the fact Juror No. 3 smiled when he reminded her of the magic question he asked everyone at the end of jury selection. Even though Juror No. 3 claimed her alleged concealment was merely an innocent mistake, the judge concluded otherwise. (Compare *People v. Wilson, supra*, 44 Cal.4th at p. 824 [no evidence juror purposely concealed alleged bias during voir dire].)

We are in no position to second-guess the judge's take on that issue. As our Supreme Court has explained, "The evidence bearing on the question whether a juror has exhibited [cause for removal] during deliberations may be in conflict. . . . In such a case the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony. The trial court may also draw upon the observations it has made of the jurors during voir dire and the trial itself. Naturally, in such circumstances, we afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*People v. Barnwell, supra*, 41 Cal.4th at p. 1053; accord, *People v. Lomax, supra*, 49

Cal.4th at p. 590 [where there is conflicting evidence about whether a juror should be removed, it is for the trial court to "weigh the credibility of those testifying," and the reviewing court must "defer to factual determinations based on these assessments"].)

Despite what he told Juror No. 3, there can be little doubt the judge was ultimately convinced Juror No. 3 committed intentional misconduct by failing to reveal her experience with gang members during voir dire. While he did not make an express finding to that effect, the totality of his remarks demonstrate that is why he removed her from the jury. (See *People v. Barnwell, supra,* 41 Cal.4th at p. 1053 [even though the trial court did not expressly find the subject juror had exhibited bias during deliberations, the thrust of the court's analysis made it clear it believed the juror had done so].) For the reasons explained above, I think it misguided to question the judge's decision in that regard. Because the record establishes to a demonstrable reality that Juror No. 3 intentionally concealed material information during the jury selection process, the judge properly removed her from the jury. (*People v. Morris* (1991) 53 Cal.3d 152, 183-184, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1 ["Concealment by a potential juror constitutes implied bias justifying disqualification"].) His decision to do so did not violate defendant's right to a fair and impartial jury.

B. Legality of the Judge's Investigation

Defendant also contended the judge's investigation into the alleged jury misconduct was improper. His argument had three parts: 1) There was insufficient evidence of juror misconduct to justify an investigation in the first place; 2) even if an investigation was warranted, the judge needlessly compromised the confidentiality of the deliberative process, and 3) the investigation effectively coerced Juror No. 11 to change her vote to conform to the view of the majority. Although the judge's investigation was thorough, I believe it was justified under the circumstances presented and did not usurp defendant's right to a fair trial before an impartial jury.

It is well established that "'the secrecy of deliberations is essential to the proper functioning of juries.'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 481-482 (*Cleveland*), quoting *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 617-619.) Thus, "'[a]s a general rule, no one – including the judge presiding at a trial – has a "right to know" how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror.'" (*Ibid*.; see generally Evid. Code, § 1150, which prohibits the impeachment of a verdict by evidence of the jurors' mental processes.)

"The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (*Cleveland, supra,* 25 Cal.4th at p. 476.) Because juror misconduct can undermine the fairness of a trial, once the court is "informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*. [Citations.]" (*People v. Barnwell, supra*, 41 Cal.4th at p. 1051.)

Juror misconduct can take many forms, including failing to deliberate. (*People v. Engelman* (2002) 28 Cal.4th 436, 440, 442 (*Engelman*) [a juror who fails or refuses to deliberate is subject to removal by the court].) But in investigating a claim that one or more jurors is shirking the responsibility to deliberate, trial courts must distinguish "between a juror who cannot fairly deliberate because of bias and one who, in good faith, disagrees with the others and holds his or her ground. 'The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that

further discussion will not alter his or her views. [Citation.]' [Citation.]" (*People v. Barnwell, supra*, 41 Cal.4th at p. 1051.)

Furthermore, in investigating whether everyone on the jury is participating in deliberations, the court must proceed "'with care so as to minimize pressure on legitimate minority jurors.' [Citation.]" (*Cleveland, supra*, 25 Cal.4th at p. 478.) "The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations." (*Id*. at p. 485.) In the end, however, "the decision whether (and how) to investigate rests within the sound discretion of the court. [Citations.]" (*Engelman, supra*, 28 Cal.4th at p. 442.) We should not disturb those decisions unless they exceed the bounds of reason. (See *People v. Earp* (1999) 20 Cal.4th 826, 892).

Here, they did not. The judge's inquiry started on the second day of deliberations, after the jury reported it was deadlocked. Speaking to the jurors as a group, he had every right to inquire whether they thought further deliberations might be fruitful. (See *Paulson v. Superior Court* (1962) 58 Cal.2d 1, 7.) None of them did, but it was apparent from their responses they had not given much attention to some of the charges. In fact, Juror No. 5 made it clear she did not believe all of the jurors had deliberated on all of the counts. While the judge was of the impression the jury was deliberating, he admitted that was not entirely apparent from the limited amount of information he had received from the jurors thus far. Therefore, he was justified in seeking further clarification of that issue by posing additional questions to the jury. (See *People v. Homick* (2012) 55 Cal.4th 816, 898 [grounds for investigation into alleged juror misconduct may be established by events that arise during deliberations and are reported by fellow panelists].)

That led to further evidence of jury dysfunction. Indeed, Juror No. 7 was adamant one of the jurors was not participating in deliberations, Juror No. 8 said he tended to agree with that, and Juror No. 9 said there were two people on the jury who "don't bother to go through any of the paperwork" or "make any comments." In addition, while the foreperson and Juror No. 2 initially told the judge they felt all of the jurors were deliberating, they changed their minds after hearing Juror No. 7's take on that issue. To compound the problem, it was obvious several of the jurors were struggling to understand what constituted sufficient deliberation, and Juror No. 3 alleged the two holdout jurors were "kind of . . . attacked" when they refused to go along with the other jurors. The judge was understandably concerned about this situation. While he did make some comments suggesting he was satisfied the jury was doing its job, he continued to harbor lingering doubts about that issue. After thinking about it overnight, he told counsel "my sense from everything I've heard . . . is yes, they are deliberating. But, candidly, I'm not there yet. I am just not there yet[,]" and "I don't have a good enough handle on it yet to make that call."

At that juncture, it would have been "appropriate" for the judge to simply reinstruct the jurors regarding their duty to deliberate and have them return to the jury room for further deliberations. (*Cleveland, supra*, 25 Cal.4th at p. 480.) It would have been the safe, almost certainly ineffective call. I do not believe the judge abused his discretion by foregoing that option and continuing his investigation by interviewing some of the jurors individually in his chambers. After all, it was clear from the jurors' responses there was considerable discord in the jury room and legitimate questions about whether everyone on the juror was actually participating in deliberations. (See *United States v. Boone* (3rd Cir. 2006) 458 F.3d 321, 327 [individual juror questioning "is a permissible tool where juror misconduct is alleged, and we have encouraged its use in such investigations"]; *People v. Russell* (2010) 50 Cal.4th 1228, 1248-1253 [in

investigating claim of juror misconduct, trial judge did not err by questioning the jury foreperson outside the presence of the other jurors].)

Once the judge embarked on this course of action, it became apparent Juror No. 3 had been relying on her own experience with gang members in forming her opinions about the case. That revelation came from Juror No. 2. The judge was not planning to interview Juror No. 2 individually, but she took it upon herself to contact the judge about this issue. The timing of her decision to do so coincided with the judge's determination on the deliberation issue. No sooner did the judge announce to counsel that he believed the jury was deliberating than Juror No. 2 requested to speak with him. At that point, the judge wisely decided to oblige the request and hear her out. And, upon learning what she had to say, he was fully justified in turning his attention to the issue of whether Juror No. 3 committed misconduct by concealing relevant information during voir dire. I disagree with the majority's conclusion the judge was required to turn a blind eye to this new information. (See *Engelman, supra*, 28 Cal.4th at p. 444 [the need for jury secrecy may properly give way to reasonable inquiry by the court when it receives information a juror has committed misconduct].)

Defendant criticized the manner in which the judge undertook his investigation, claiming he unnecessarily revealed the identity of the holdout jurors. But the holdout jurors were the only ones being accused of misconduct. Juror No. 9 did tell the judge there were three or four people on the jury who did very little talking. But he said there were two jurors in particular who were not making any contribution to deliberations, and the questioning of the other jurors made it clear those two jurors were the holdouts. Under these circumstances, it was reasonable to ascertain the holdouts' identity for the purpose of facilitating the judge's investigation. In fact, the investigation would hardly have been complete without hearing the holdouts' side of the story. (See

People v. Barber (2002) 102 Cal.App.4th 145, 151-152 [trial court erred by interviewing only those jurors who supported the allegation of juror misconduct].)

As for the depth and nature of the judge's questioning, a case could be made it focused too heavily on the content of the jurors' deliberations and their subjective thought processes. In investigating whether the holdout jurors were refusing to deliberate, the judge was justified in eliciting information regarding their general willingness to discuss the case and engage with the other jurors. He might have avoided questioning that was likely to reveal the substance of their deliberations, and unfortunately that didn't happen when the judge interviewed the jurors individually in his chambers.

For example, in interviewing Juror No. 7, the judge asked her to explain why the jury was deadlocked. When Juror No. 7 said it was because Juror No. 3 did not believe certain aspects of the testimony, the judge asked her to disclose more precisely what Juror No. 3 said in that regard. That led Juror No. 7 to reveal that Juror No. 3 did not believe Alejandro's testimony. The judge then asked her if any of the other jurors ever attempted to get Juror No. 3 to change her mind, and that led Juror No. 7 to divulge the particular evidence they relied on in attempting to do so. Thus, in the course of just a few questions to Juror No. 7, the thought processes of both the minority and majority jurors were laid bare.

The judge's questioning of the foreperson resulted in the disclosure of similar information, although much of what she said was volunteered. Moreover, by opening up the questioning to counsel, the judge risked further exposure of the jurors' mental processes. (See *Cleveland, supra*, 25 Cal.4th at p. 485 [direct questioning by the attorneys to jurors during deliberations is "fraught with peril" and should generally be avoided].) However, defense counsel asked few questions, and when the prosecutor interviewed the jurors, she tried to frame her questions so as to prevent disclosure of the

jurors' statements and sought guidance from the judge in determining the scope of her examination. Aware of the need to safeguard the privacy of deliberations, the judge precluded her from inquiring into some areas and exercised reasonable control over the questioning as a whole.

While not ideal – trials never are – the manner in which the judge investigated the alleged misconduct in this case was not likely to hamper free, open and candid debate in the jury room. I do not believe the investigation constituted an abuse of discretion or infringed defendant's fair trial rights. (See generally *United States v. Baker* (2nd Cir. 2001) 262 F.3d 124, 132 [in recognizing it is often difficult to avoid getting into the jurors' subjective impressions when investigating claims of misconduct, the court determined the trial judge's failure to do so was a harmless lapse of judgment]; *United States v. Thomas, supra,* 116 F.3d at p. 621 [acknowledging that as to some forms of alleged juror misconduct, "the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations."]; *In re Hamilton, supra,* 20 Cal.4th at p. 298, fn. 19 ["the rule against proof of juror mental processes is subject to the well-established exception for claims that a juror's preexisting bias was concealed on voir dire."].)

In arguing otherwise, defendant relied on *People v. Nelson* (2016) 1 Cal.5th 513 (*Nelson*). The way in which the trial court invaded the deliberative process in that case was "unique and egregious." (*Id.* at p. 560.) Upon learning of the jury's deadlock in the penalty phase of the trial, the court acceded to the prosecutor's request to have the jurors fill out an extensive questionnaire that was designed to ferret out possible juror misconduct. The problem was, there was no indication of misconduct before then: "*Based solely on the reported impasse*, the court subjected the jurors to a detailed questionnaire that asked them to report on the thoughts and conduct of their fellow jurors – specifically, whether the jurors were refusing to deliberate, whether they were basing

their position on anything other than the evidence and jury instructions, and whether they were expressing views about the inappropriateness of the death penalty or life without parole based on anything other than evidence and law." (*Id*. at p. 569, italics added.) The Supreme Court determined this constituted an unwarranted intrusion into the content of deliberations that was likely to have a coercive effect on the holdout jurors. (*Id*. at pp. 569-573.)

Likewise, in *Engelman, supra*, 28 Cal.4th 436, the Supreme Court disapproved of a standard jury instruction that required jurors to report instances of alleged misconduct to the court. While recognizing jurors are free "to bring to the court's attention any perceived misconduct that occurs in the course of deliberations[,]" the court determined "it is not conducive to the proper functioning of the deliberative process for the trial court to declare – before deliberations begin and before any problem develops – that jurors should oversee the reasoning and decisionmaking process of their fellow jurors and report perceived improprieties in that process to the court." (*Id*. at p. 440.)

The upshot of *Nelson* and *Engelman* is that, in order to protect the secrecy of the deliberative process and avoid putting pressure on minority jurors to change their views, judges should not "needlessly . . . induce jurors to expose the contents of their deliberations." (*Engelman, supra*, 28 Cal.4th at p. 446.) However, *Nelson* and *Engelman* are distinguishable from the present case in one important respect. Whereas the juries in those cases were instructed to report (*Engelman*) or questioned about (*Nelson*) possible juror misconduct before there were any signs of such, the trial judge here did not start delving into the issue of juror misconduct until he learned there was a potential problem regarding the holdout jurors' willingness to engage in deliberations. In light of that discovery, the judge was entitled to make further inquiry into that issue. (See *Engelman, supra*, 28 Cal.4th at p. 442 [trial court has "a duty to conduct reasonable inquiry into allegations of juror misconduct"]; *People v. Bonilla* (2007) 41 Cal.4th 313, 350 [upon

learning of grounds for a juror's dismissal the trial court "has an affirmative obligation to investigate"]; *People v. Hem* (2019) 31 Cal.App.5th 218 [judge prejudicially erred by failing to investigate alleged juror misconduct that was brought to its attention during deliberations].)

Regarding whether the judge's investigation had a coercive effect on Juror No. 11, I recognize "[j]urors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Cleveland, supra*, 25 Cal.4h at p. 476.) However, the judge's investigation here was not likely to have a chilling effect on Juror No. 11's participation in deliberations, or cause her to change her opinion about the case.

How do we know that? Well, for starters, Juror No. 11 was quite adamant about her not-guilty position when the court initially questioned her in chambers. After conceding she had not been very forthcoming during deliberations up to that point, she told the judge, "I have been in there listening to [the other jurors], and . . . their opinion[s]. I have my opinion. . . . [S]o I can go in there and be more vocal with them. [¶] *Is that going to change my mind? No*." (Italics added.) Her response was so emphatic it led the prosecutor to question whether she would ever be willing to abandon her position and vote in favor of a conviction. However, in response to further questioning, Juror No. 11 assured the court she would be open to listening to the other jurors and changing her mind if they provided her with good reasons for doing so.

After removing Juror No. 3 from the jury, the judge recognized there might be added pressure on Juror No. 11 to conform her vote to the majority, so he called her back into chambers for further questioning. Juror No. 11 assured the court she could continue deliberating, and when the judge asked her if there would be an "intimidation factor" in the jury room now that Juror No. 3 was out of the picture, she resolutely

declared, "I feel that if you're to excuse me I would for the rest of life wonder about the mere fact that it was stated that they felt that some of us did not vocalize enough. And so for that reason I would want to go back in there and be more vocal." This response signaled Juror No. 11 was determined to engage in deliberations irrespective of who was on the jury. I think the exchange reflects admirably on both the court and the juror.

Even so, the majority concludes the judge's inquiry was insufficient to assure Juror No. 11 would be able to remain independent. In particular, they fault the judge for not asking Juror No. 11 if she would be able to stick to her belief that defendants were not guilty if she continued to believe that was the case. But that was hardly an issue. As I have pointed out, Juror No. 11 told the judge with certainty that she was not going to change her mind about the case. If anything, this suggested Juror No. 11 might be too entrenched in her views, which is why the judge questioned her about her willingness to come around to another position if she were presented with good reasons for doing so. This did not amount to improper judicial coercion.

Moreover, when questioned by the judge, Juror No. 11 said she could keep an open mind and was determined to become more engaged in deliberations. Based on everything she said, the judge did not abuse his discretion in determining she was ready, willing and able to defend her position to the other jurors, even if she did not have Juror No. 3 by her side in the jury room. And, of course, once deliberations began anew with Juror No. 3's replacement, the jury deliberated for nearly five hours before reaching its verdict. This demonstrates Juror No. 11 did not simply capitulate to the will of the majority jurors once Juror No. 3 was discharged.

In sum, I am confident defendant received a fair trial. The trial judge did not violate defendant's right to a fair and impartial jury by investigating the alleged misconduct and ultimately removing Juror No. 3 from the case. I would therefore affirm the judgment.

BEDSWORTH, J.